



November 22, 2002

Ms. Sheri Bryce Dye  
Assistant Criminal District Attorney  
Criminal District Attorney's Office  
Bexar County  
300 Dolorosa, Fifth Floor  
San Antonio, Texas 78205-3030

OR2002-6714

Dear Ms. Dye:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 172830.

The Bexar County Sheriff's Office (the "sheriff") received a request for copies of official documentation pertaining to the death of a specified inmate. You claim that the requested information is excepted from disclosure pursuant to sections 552.101, 552.108, 552.111, and 552.134 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information.

You claim that the information at issue contains medical records that are subject to the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. We note that the MPA provides that "a record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter." Occupations Code § 159.002(b). This office has concluded that the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). When a patient is deceased, as here, medical records may be released only on the signed consent of the deceased's personal representative. *See* Occ. Code §§ 159.005(a)(5). The consent must specify (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. *See* Occ. Code §§ 159.004, .005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. *See* Open Records Decision No. 565 at 7 (1990). Accordingly, we conclude that the MPA information that we have marked may only be disclosed in accordance with the access provisions of the MPA. *See* Occ. Code § 159.005(a)(5), (b); *see also* Open Records Decision Nos. 598 (1991), 546 (1990) (finding that because hospital treatment is routinely conducted under supervision of physicians, documents relating to diagnosis and treatment

during hospital stay would constitute protected MPA records). Absent the applicability of an MPA access provision, the sheriff must withhold this marked information pursuant to the MPA.

We note that portions of the information at issue constitute mental health records that are subject to chapter 611 of the Health and Safety Code. Chapter 611 provides for the confidentiality of records created or maintained by a mental health professional. Section 611.002(a) provides:

Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.

Health & Safety Code § 611.002. Section 611.001 defines a “professional” as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. *See* Health and Safety Code § 611.001. Sections 611.004 and 611.0045 provide for access to mental health records only for certain individuals. *See* Open Records Decision No. 565 (1990). Based on our review of the information at issue, we find that some of the information which we have marked constitutes mental health records that are subject to chapter 611. Accordingly, we conclude that the sheriff may only disclose this information as provided by the access provisions of sections 611.004 and 611.0045. Absent the applicability of a mental health record access provision, the sheriff must withhold this information pursuant to chapter 611 of the Health and Safety Code.

We also note that portions of the information at issue constitute dental records that are subject to chapter 258 of the Occupations Code. Section 258.102 provides:

(a) The following information is privileged and may not be disclosed except as provided by this article:

- (1) a communication between a dentist and a patient that relates to a professional service provided by the dentist; and
- (2) a dental record.

- (b) The privilege described by this section applies regardless of when the patient received the professional service from the dentist.

Occ. Code § 258.102. A "dental record" means dental information about a patient that is created or maintained by a dentist and relates to the history or treatment of the patient. *See* Occ. Code §258.101. When a patient is deceased, as here, dental records may be released only on the signed consent of the deceased 's personal representative. *See* Occ. Code § 258.104(b)(5). The consent must specify (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. *See id.* Accordingly, we conclude that the dental record information that we have marked may only be disclosed in accordance with the access provisions of section 258.104. Absent the applicability of a dental record access provision, the sheriff must withhold this information pursuant to chapter 258 of the Occupations Code.

We note that a portion of the information at issue is excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with section 559.003 of the Government Code.<sup>1</sup> Sections 559.001, 559.002, and 559.003 provide:

Sec. 559.001. DEFINITIONS. In this chapter:

- (1) "Biometric identifier" means a retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry.
- (2) "Governmental body" has the meaning assigned by Section 552.003 [of the Government Code], except that the term includes each entity within or created by the judicial branch of state government.

Sec. 559.002. DISCLOSURE OF BIOMETRIC IDENTIFIER. A governmental body that possesses a biometric identifier of an individual:

- (1) may not sell, lease, or otherwise disclose the biometric identifier to another person unless:

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<sup>1</sup> Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. *See* Gov't Code § 552.101. Section 552.101 encompasses information that is protected from disclosure by other statutes.

- (A) the individual consents to the disclosure;
- (B) the disclosure is required or permitted by a federal statute or by a state statute other than Chapter 552 [of the Government Code]; or
- (C) the disclosure is made by or to a law enforcement agency for a law enforcement purpose; and

(2) shall store, transmit, and protect from disclosure the biometric identifier using reasonable care and in a manner that is the same as or more protective than the manner in which the governmental body stores, transmits, and protects its other confidential information.

Sec. 559.003. APPLICATION OF CHAPTER 552. A biometric identifier in the possession of a governmental body is exempt from disclosure under Chapter 552.

Gov't Code §§ 559.001, .002, .003. Section 559.002 does not appear to permit the disclosure of the submitted fingerprint information to the requestor in this instance. Therefore, we conclude that the sheriff must withhold the fingerprint information that we have marked pursuant to section 552.101 of the Government Code in conjunction with section 559.003 of the Government Code.

You also claim that portions of a custodial death report contained within the information at issue are excepted from disclosure pursuant to section 552.101 in conjunction with article 49.18(b) of the Code of Criminal Procedure. In Open Records Decision No. 521 at 5 (1989), this office concluded that under article 49.18(b), in conjunction with a directive issued by the attorney general, section one of a custodial death report filed with this office is public information, but sections two through five of the report, as well as attachments to the report, are confidential. *See* Code Crim. Proc. art. 49.18(b) (attorney general shall make report, with exception of any portion of report that attorney general determines is privileged, available to any interested person). Accordingly, we conclude that the sheriff must release section one of this report to the requestor. However, because sections two through five of the report, as well as attachments to the report, are deemed confidential under article 49.18(b), we also conclude that the sheriff must withhold this particular information from the report pursuant to section 552.101 of the Government Code in conjunction with article 49.18(b) of the Code of Criminal Procedure.

You also claim that portions of the information at issue are excepted from disclosure pursuant to section 552.101 in conjunction with chapter 411 of the Government Code. We note that criminal history record information ("CHRI") generated by the National Crime Information Center ("NCIC") or by the Texas Crime Information Center ("TCIC") is confidential. Federal regulations prohibit the release of CHRI maintained in state and local CHRI systems to the general public. *See* 28 C.F.R. § 20.21(c)(1) ("Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the purpose for which it was given."), (2) ("No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself."). Section 411.083 provides that any CHRI maintained by the Department of Public Safety ("DPS") is confidential. *See* Gov't Code § 411.083(a). Similarly, CHRI obtained from the DPS pursuant to statute is also confidential and may only be disclosed in very limited instances. *See id.* § 411.084; *see also id.* § 411.087 (restrictions on disclosure of CHRI obtained from DPS also apply to CHRI obtained from other criminal justice agencies). We also note that section 411.083 does not distinguish between the CHRI of a person who is living and one who has died. Furthermore, we do not believe that section 411.083 is intended solely to protect the privacy interest of the subject individual. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177, 187 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (maintenance of criminal history record information essential for investigation of crime). Based on our review of your arguments and the information at issue, we conclude that the sheriff must withhold the information that we have marked pursuant to section 552.101 of the Government Code in conjunction with chapter 411 of the Government Code. *See id.*; *see also* Gov't Code § 411.106(b), .082(2) (defining criminal history record information).

You also claim that the information at issue is excepted from disclosure pursuant to section 552.134 of the Government Code. Section 552.134 provides in pertinent part:

- (a) Except as provided by Subsection (b) or by Section 552.029, information obtained or maintained by the Texas Department of Criminal Justice [(the "department")] is excepted from the requirements of Section 552.021 if it is information about an inmate who is confined in a facility operated by or under a contract with the department.

Gov't Code, § 552.134(a). We note that the information at issue does not concern an inmate who is or was confined in a facility operated by the department. Accordingly, we conclude

that the sheriff may not withhold any portion of the remaining information at issue pursuant to section 552.134 of the Government Code.

You also claim that portions of the information at issue are excepted from disclosure pursuant to section 552.108 of the Government Code. Section 552.108 provides in pertinent part:

- (a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted . . . if:
  - (1) release of the information would interfere with the detection, investigation, or prosecution of crime;
  - (2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication;

....

- (b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted . . . if:
  - (1) release of the internal record or notation would interfere with law enforcement or prosecution;
  - (2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication[.]

Gov't Code 552.108(a)(1),(2), (b)(1),(2). Subsections 552.108(a)(1) and (b)(1) protect records pertaining to pending criminal investigations or prosecutions. Subsections 552.108(a)(2) and (b)(2) protect records pertaining to criminal investigations or prosecutions that have concluded in a final result other than conviction or a deferred adjudication. Generally, a governmental body claiming section 552.108 as an exception to disclosure of requested information must demonstrate how and why release of the requested information would interfere with law enforcement. *See* Gov't Code § 552.108(a), (b), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). We note that the sheriff has not demonstrated, nor are we able to ascertain from our review of the submitted information,

how any portion of this information relates to a pending criminal investigation or prosecution or to a criminal investigation or prosecution that has concluded in a final result other than conviction or deferred adjudication. Accordingly, we conclude that the sheriff may not withhold any portion of the remaining information at issue pursuant to section 552.108 of the Government Code.

You also claim that portions of the information at issue are excepted from disclosure pursuant to the deliberative process privilege incorporated into section 552.111 of the Government Code. We note that section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. See *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); see also *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.--Austin, 2001, no pet.). The purpose of section 552.111 is "to protect from public disclosure advice and opinions on policy matters and to encourage frank and open discussion within the agency in connection with its decision-making processes." *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.--San Antonio 1982, writ ref'd n.r.e.). An agency's policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. See Open Records Decision No. 615 at 5-6 (1993). After carefully reviewing your arguments and the information at issue, we find that no portion of this information constitutes communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the sheriff. Accordingly, we conclude that the sheriff may not withhold any portion of the information at issue pursuant to the deliberative process privilege incorporated into section 552.111 of the Government Code.

In summary, the sheriff must withhold the MPA information that we have marked under the MPA, absent the applicability of an MPA access provision. The sheriff must withhold the mental health record information that we have marked under chapter 611 of the Health and Safety Code, absent the applicability of the access provisions of sections 611.004 and 611.0045. The sheriff must withhold the dental record information that we have marked under chapter 258 of the Occupations Code, absent the applicability of the access provisions of section 258.104. The sheriff must withhold the fingerprint information that we have

marked pursuant to section 552.101 of the Government Code in conjunction with section 559.003 of the Government Code. The sheriff must withhold sections two through five of the submitted custodial death report, as well as attachments to the report, pursuant to section 552.101 in conjunction with article 49.18(b) of the Code of Criminal Procedure. The sheriff must withhold the information that we have marked pursuant to section 552.101 in conjunction with chapter 411 of the Government Code. The sheriff must release the remaining submitted information to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental

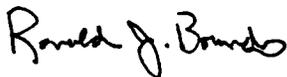
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body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Ronald J. Bounds  
Assistant Attorney General  
Open Records Division

RJB/lmt

Ref: ID# 172830

Enc. Submitted documents

cc: Ms. Matilde Gomez  
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(w/o enclosures)